Supreme Court, U.S.
FILED

No. 021844 JUN 11 2003

IN THE

SUPREME COURT OF THE UNITED STATES

JOHN RICHARD FRAISER,

Petitioner

v.

TONY HOWERTON, Warden, Ware State Prison,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

SUPPLEMENTAL APPENDIX FOR WRIT OF CERTIORARI

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APPENDIX D

(June 2, 2000)

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JOHN RICHARD FRAISER :	
Petitioner,	: PRISONER HABEAS
	: CORPUS
v.	: 28 U.S.C. § 2241
	:
GEORGE SMITH,	: CIVIL
Respondent.	: ACTION NO.
	: 1:99-CV-3319-ODE

MAGISTRATE JUDGE'S
FINAL REPORT AND RECOMMENDATION

Petitioner, John Richard Fraiser, has filed the instant application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 to challenge his parole revocation. The matter is now before the Court for consideration of the Respondent's motion to dismiss the petition as untimely pursuant to 28 U.S.C. § 2244(d) (1) [Doc. 7] and the Petitioner's memorandum in opposition thereto [Doc. 8].

Petitioner was convicted of murder and armed robbery in the Superior Court of Gwinnett County on August 10, 1979, for which he received a life sentence. [Resp. Ex. 1, 5]. He was paroled on September 3,

1996. [Id.]. On May 23, 1997, the state Board of Pardons and Paroles revoked Petitioner's parole status.

Petitioner did not directly appeal the parole revocation, but, on July 1, 1998, he filed a state habeas corpus petition in the Ware County Superior Court. [Resp. Ex. 3]. Following an August 13, 1998, evidentiary hearing, the state habeas corpus court denied relief on November 5, 1999. [Resp. Ex. 11]. On November 16, 1999, the Supreme Court of Georgia denied Petitioner's application for a certificate of probable cause to appeal the denial of habeas corpus relief. Petitioner filed the instant petition for federal habeas corpus relief on December 15, 1999.

Section 101 of the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214, amended 28 U.S.C. § 2244 by adding the following provision: "A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court." 28 U.S.C. § 2244(d) (1). Section 2244(d) (1) (A) provides that the limitation period runs from "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." The operation of the limitations period is tolled for "[t]he time during which a properly filed application for State post-conviction or other collateral review...is pending." 28 U.S.C. § 2244(d) (2).

Pursuant to O.C.G.A. § 5-6-35(a) (5) & (d), the time for seeking direct review of the parole revocation expired on June 22, 1997, and the 28 U.S.C. § 2244(d) (1) limitations period thus began to run on that date and expired one year later on June 23, 1998. As Petitioner did not file his state habeas corpus action until July 1, 1998. -- after the expiration of the limitations period -- the 28 U.S.C. § 2244 (d) (2) tolling provision does not apply, and the instant petition is untimely.

In his memorandum in opposition, Petitioner requests that this Court equitably toll the limitations period on the grounds that he is untrained in the law, and, given the exigencies of incarceration, he has had difficulty researching and preparing his case. Such claims do not provide sufficient grounds to justify equitable tolling. Felder v. Johnson, 204 F.3d 168 (5th Cir 2000) (holding that ignorance of the law does not justify equitable tolling); Miller v. Marr, 141 F.3d 976, 978 (10th Cir. 1998) (holding equitable tolling not warranted where prisoner claimed he lacked access to federal statutes and case law land did not learn of AEDPA's time limitations until too late), cert. denied, 525 U.S. 891, 119 S. ct. 210, 142 L. Ed. 2d 1731(1998).

Petitioner also points out that some of his claims relate to his current incarceration and the cruel and unusual treatment that he receives in violation of his Eighth Amendment rights. Such claims are not cognizable in habeas corpus, see 28 U.S.C. § 2254; however, Petitioner may file a civil rights action

pursuant to 42 U.S.C. § 1983 should he wish to pursue such claims.

For the foregoing reasons, this Court hereby **RECOMMENDS** that Respondent's motion to dismiss [Doc. 7] be **GRANTED** and that the instant petition be **DISMISSED** as untimely pursuant 28 U.S.C. § 2244(d) (1). The Clerk is **DIRECTED** to submit the Final Report and Recommendation with objections, if any, to the District Court after expiration of the above time period. The Clerk is further **DIRECTED** to terminate the District Court's referral of this case to the undersigned magistrate judge.

SO REPORTED AND RECOMMENDED, this ____ day of June, 2000.

_____

E. CLAYTON SCO ELD III
UNITED STATES MAGISTRATE JUDGE